PUBLIC LAW BOARD NO. 4104

Case No. 9,10 and 11

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Burlington Northern Railroad Company

STATEMENT OF CLAIM: "Claim of this System Committee of the Brotherhood that:

1. The Carrier violated the agreement when it changed the assigned work week of Ottawa Seniority Sub-district #3 (Galesburg Terminal) Gang Q-073 from a Monday through Friday work week with Saturdays and Sundays designated as rest days to a work week of Thursday through Monday with Tuesdays and Wednesdays designated as rest days (System Files 3 Gr MWA 82-8-3T and 3 Gr MWA 82-8-3A).

2. As a consequence of the aforementioned violation, the members of Gang Q-073 (Messrs. G. Adwell, L. Johnson, J. White, Jr., S . Rodriquez, L.. Puffinbuger, W. Johnston and F. Jaeger) shall each be allowed the difference between their respective straight time rates and time and one-half rates of pay for work performed on Saturday, March 27 and Sunday, March 28, 1982, a total of sixteen (16) hours and they shall each be allowed sixteen (16) hours of pay at their respective straight time rates of pay for Tuesday, March 30 and Wednesday, March 31, 1982 and Messrs. R.G. Almaguer, B.L. Brown, A. Ceervantz, S. Arguello, W.E. Mitchell, M.A. Valdez and J.A. Garcia shall each be allowed sixteen (16) hours of pay at their respective time and one-half rates for Saturday, March 27 and Sunday, March 28, 1982."

OPINION OF BOARD: By letter dated February 19 1982, Carrier Division Superintendent notified the Organization's General Chairman that certain changes in the work week of Gang Q-073 assigned to Carrier's Galesburg Terminal would be made, effective March 15, 1982. Essentially, the change would result in a work week of Thursday to Monday with rest days of Monday and Tuesday, instead of Monday through Friday with rest days of Saturday and Sunday, for the affected employees.

The Organization timely protested Carrier's proposed change. Carrier rejected the protest. Thereafter, the claim was handled in the usual manner on the property. It is now before this Board for adjudication.

The Organization contends that Carrier's action violates Rule 24 of the Agreement. It points out that this provision mandates rest days of Saturday and Sunday where the duties of the disputed position can be "reasonably met in five (5) days." In the Organization's view, the duties of its forces have been reasonably met for over 20 years without the staggered work week. Nor, it asserts, are there any operational requirements which require a changed work week. As such, the Organization maintains that the claim should be sustained in its entirety.

Carrier, on the other hand, contends that nothing in the Agreement bars it from making the disputed changes. First, it argues, it has the unfettered right to combine four sections into a single section at its Galesburg Terminal. As Carrier sees it, no language in any rule cited by the Organization prevents it from making this change.

Similarly, Carrier insists, it did not violate Rule 24 when it required Gang Q-073 to work a Thursday-Monday work week, while other Gangs continued on a Monday-Friday schedule. In support of this contention, Carrier insists that its operational needs require a staggered week. In fact, it notes, Maintenance of Way work must be performed on Saturdays and Sundays. Thereby necessitating that some gang be assigned to work on those days.

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Carrier acknowledges that in the past Maintenance of Way work was performed on a straight time basis Monday-Friday and on an overtime basis on Saturday and Sunday. However, Carrier insists, this history simply demonstrates the need for a staggered work week and not that the overtime excesses of the past must be continued in the future.

Finally, Carrier urges that no damages are due even if the Organization's claim is sustained. Specifically, it asserts that the relief requested would amount to double or triple penalty payments. Thus, and for the foregoing reasons, Carrier asks that the claims be denied in their entirety.

After careful review of the record, we are convinced that claims in cases 9,10 and 11 must be sustained in part. It is undisputed that for well over 20 years gangs at the Galesburg Terminal have worked the traditional Monday-Friday work week with Saturdays and Sundays off. While repair work was done on those days, it was only on an overtime basis.

Given this history, Carrier has not met its burden of demonstrating the existence of operational requirement which would require a staggered work week. Rule 24 permits a staggered work "in accordance with...operational requirements." It also requires days off of Saturday and Sunday "so far as practicable." Clearly, for over 20 years "operational requirements" did not necessitate a staggered work week and the Carrier has not shown otherwise in these cases. Carrier simply failed to meet this burden.

Finally, we note Carrier's contention that the relief sought would amount to a double or triple penalty. Therefore, the members of Gang Q-073 (Claimants G. Adwell, L. Johnson, J. White, Jr., S. Rodriquez, L. Puffinbuger, W. Johnston and F. Jaeger) shall not be compensated at eight (8) hours of pay at the straight time rate for Tuesday, March 30 and Wednesday, March 31, 1982, but will be allowed the overtime rate of pay for Saturday March 27 and Sunday March 28, 1982.

Also, Claimants R.G. Almaguer, B.L. Brown, A. Cervantez, S. Arguello, W.E. Mitchell, M.A Valdez and J.A. Garcia are senior employees who lost the opportunity to work Saturday and Sunday. As a result, those employees shall be paid eight (8) hours at the straight time rate of pay for Saturday March 27 and Sunday March 28, 1982. Accordingly, the claim is sustained to the extent indicated in the Opinion.

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FINDINGS: That Public Law Board No. 4104 upon the whole record and all of the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934:

That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein: and

That the Agreement was violated.

AWARD: Claim sustained to the extent indicated in the Opinion.

Paul S. Swanson

P. Swanson, Employe Member

E J Kallinen

E. Kallinen, Carrier Member
(Dissent attached)

Martin F. Scheinman, Neutral Member

December 6, 1989

CARRIER'S DISSENT
TO THE AWARD IN CASES
9, 10, AND 11 OF PUBLIC LAW
BOARD 4104

While arbitrators in the railroad industry generally have considerable latitude in interpreting collective bargaining agreements, there are limits to that latitude which, if exceeded, render the arbitrator's decision null and void, without precedential force. The Arbitrator's decision in the instant cases, we submit, far exceeds the bounds of his legitimate jurisdiction because it manifests a clear disregard for the parties' collective bargaining agreement. Accordingly, it should be treated as a nullity, without precedential value. We intend to so treat it and submit that others should do the same.

The evidence of record in these cases is clear. There was a bona fide need to have maintenance of way services performed at Galesburg terminal on Saturdays and Sundays, just as there was the other five days of the week. The Organization at no time denied or otherwise challenged this fact. Neither does the Arbitrator's opinion deny or take issue with this fact; on the contrary, it explicitly acknowledges as much by stating, "... While repair work was done on those days [Saturday and Sunday], it was only on an overtime basis."

The amount of work done at Galesburg terminal on Saturdays and Sundays was not insignificant. As established by the evidence submitted during the handling of the claim on the property (which evidence was never rebutted or otherwise contested by the Organization), during the 12-month period immediately preceding

the effective date of the change to the staggered work weeks, the four section crews employed there worked a total of 3148 man hours on Saturdays and Sundays. Carrier's Exhibit 15, p. 5. This equated to approximately four employees each working 16 hours (8 hours on Saturday and 8 hours on Sunday) each of the 52 weekends during the course of the year.

The need to have the track maintenance work done at Galesburg on weekends was, in and of itself, sufficient justification for Carrier's decision to establish regular, staggered five-day assignments to do the work. Having that work done on an overtime basis, as in the past, was no longer acceptable, for in addition to being a more costly procedure, there was the increasingly difficult problem of finding the required number of workers who were available and willing to work on their rest days. This problem was addressed during the handling of the claim on the property by Galesburg Terminal Roadmaster E. R. Miller:

> "... Having a regular crew with regular work days of Saturday and Sunday guarantees us of a full crew to correct problems and perform needed maintenance, instead of calling through the entire roster of employees assigned the maintenance of way department on their rest days, and at most getting one or two men, and not a full crew, to report for repair problems that arise." Carrier's Exhibit 18, p. 2.

The Organization at no time contested the fact that rounding up sufficient workers to report for overtime duty on weekends at Galesburg had become a problem. It merely continued to insist that the weekend work should be done on an overtime basis because that's the way it had been done in the past.

Unfortunately, the history of having the weekend maintenance of way work done at Galesburg on an overtime basis was also viewed by the Arbitrator to be of great import. It should not have been. It should have been of no import whatsoever

because it is totally irrelevant and immaterial to the issue of whether, under Rule 24, the change to staggered work weeks was proper. Under Rule 24, the "operational requirement" of having the need to have maintenance work done there on Saturdays and Sundays, as well as the other five days of the week, was all that was required in order for the Carrier to make the desired changes. A seven-day position existed within the meaning of Rule 24, and Rule 24E provides in such cases for the staggering of regular, five-day assignments over the seven-day span:

> "E. Seven-day Positions
>
> "On Positions [services, duties or operations necessary to be performed] which are filled seven (7) days per week any (2) consecutive days may be the rest days with the presumption in favor of Saturday and Sunday." (Emphasis added).

Three of the four section crews assigned to fill the seven-day position at Galesburg had Saturday and Sunday rest days. It was not practical to have the fourth crew with those same rest days. Indeed, since someone was needed to fill the position on those days, it was impossible to have everyone off on rest.

Aside from the fact that nothing in Rule 24 prohibits the Carrier from staggering regular, five-day assignments to fill seven-day positions (services, duties or operations necessary to be performed) even if it has at some time in the past protected such positions on Saturday and Sunday by calling employees to work on an overtime basis, the authorities have consistently recognized that such overtime practices are no bar to future use of staggered assignments even whenthe avoidance of overtime costs is a reason for doing so. Three awards directly on point on this issue were cited to the Arbitrator in this case: NRAB Third Division Award 21394, BRS v. TP (Wallace); Award 80 of Public Law Board 2960, BMWE v. C&NW (Vernon); and

NRAB Second Division Award 10383, BRC v. BN (Meyers). The first of these awards, Third Division Award 21394, held as follows on the issue:

> "Lastly, the Brotherhood's submission argues that the sole purpose Carrier had in establishing the new position was to have seven day coverage at the pro rata rate of pay and eliminate holidays that fall on Monday on the position. It is sufficient 'to point out that Carrier's position on the property negatives this. Moreover, we cannot agree that the purpose of avoiding a penalty rate of itself invalidates staggering. The Carrier cites an impressive array of awards to this effect; we cite only: Awards 13365 (Moore) and 15463 (Ives)." (Emphasis added).

The Arbitrator in the instant cases took the easy way out and chose not to deal with this line of awards. He did not even acknowledge them, to say nothing of attempting to distinguish them. This failure to wrestle with strong, direct precedent only serves to underscore the lack of precedential value of the instant award.

As for the issue of damages, it is noted that the Arbitrator's decision in Cases 2 and 3 of this Board, which involve facts and issues similar to those presented in the instant cases, and which was issued simultaneously with the decision here, the following statement appears:

> "The issues raised in this claim are virtual identical to those in Case Nos. 9, 10 and 11, decided herewith. However, while these claims were sustained, there is no basis for awarding any monetary damages in Case Nos. 2 and 3. These cases involved essentially a change in work week, but not claims which would result in monetary payments. Moreover, Carrier should not be required to pay damages because Claimants in this dispute voluntarily bid on the staggered assignments and as the senior bidders, Carrier was obligated to award them the assignments at issue. Given these factors, this Board shall sustain the claim as it pertains to the issue of postings but shall not order any monetary compensation." (Emphasis added).

Similar facts existed in the instant case. The Claimants listed in parts 2 and 3 of the Statement of Claim bid on the staggered assignments in question and, by virtue of their seniority, were awarded them. There is no dispute about this. The Arbitrator, however, for reasons not divulged, departs from his reasoning in Cases 2 and 3 and awards monetary damages to the Claimants here. Further palpable error is thus committed.

Respectfully submitted,

E. J. Kallinen

E. J. Kallinen, Carrier Member